RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-339

IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF

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REPLY

Having abandoned the reasoning of the decision below, Respondents now invoke policy arguments, snippets of legislative history, and vague declarations of legislative purpose. These efforts are unavailing. Text, canons of interpretation, and historical sources all point to the same conclusion: § 9658 does not affect statutes of repose.

I. BY ITS TERMS, § 9658 APPLIES ONLY TO STATUTES OF LIMITATIONS, NOT STATUTES OF REPOSE

The plain text resolves this case. In short, § 9658 is not best read—indeed, cannot sensibly be read—to affect statutes of repose.

A. On Its Face, § 9658 Unambiguously Applies Only To Statutes of Limitations

Section 9658 does nothing more or less than postpone a state-law "commencement date." § 9658(a)(1). That simple fact dooms Respondents' case.

First, Respondents' reading is incompatible with § 9658's definition of the term "commencement date." Under § 9658, a "commencement date" is the date that begins an "applicable limitations period," which is in turn defined as the period when a civil action "may be brought." § 9658(b)(2)-(3). A "commencement date" thus marks the date when the plaintiff's claim has accrued or, equivalently, when the plaintiff's claim "may be brought" under state law. That definition perfectly captures statutes of limitations, which run from accrual. *See* Pet. Br. 21-23. Indeed, North Carolina's statute of limitations, which adopts a discovery rule, expressly runs from the date when a claim has "accrue[d]." N.C. Gen. Stat § 1—52(16); *see*

also Merck & Co. v. Reynolds, 559 U.S. 633, 644 (2010) (describing the discovery rule "in the statute of limitations context" as "a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it"). In addition, Congress's focus on accrual—that is, the date when an action may *commence*—explains why § 9658 uses the term "*commencement* date." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) ("[A]n action *accrues* when the plaintiff has a right to *commence* it" (second emphasis added and internal quotation marks omitted)).

By contrast, the beginning of what Respondents call a "period of repose" has no necessary or logical connection with when a claim "may be brought." This point, too, is reflected in North Carolina law, as that State's statute of repose begins to run from the defendant's last action, regardless of whether a claim has or could have accrued. *See* N.C. Gen. Stat § 1—52(16) (providing a statute of repose running from the "last act or omission of the defendant"). Because statutes of repose do not run from the date when a claim "may be brought," they do not have a "commencement date" within the meaning of § 9658. Therefore, statutes of repose cannot possibly be affected by § 9658. This textual point would resolve this case even if the phrase "statute of limitations" were understood to encompass statutes of repose.

In an attempt to expand § 9658's statutory definitions, Respondents cite cases that use phrases such as "may be brought" in connection with statutes of repose. *See* Resp. Br. 18. But these sources only confirm that statutes of repose dictate the back-end point in time beyond which a claim may *not* be brought. *See id.* (quoting *Boudreau v. Baughman*,

368 S.E.2d 849, 857 (N.C. 1988) ("'If the action is *not* brought within the specified period,' a plaintiff has *no* cause of action" (emphases added)); *Bernick v. Jurden*, 293 S.E.2d 405, 413 (N.C. 1982) (distinguishing a statute of limitations from "a statute of repose," which "places *a cap or outer limit* on the time period within which a products liability action may be brought" (emphasis added)); *Hodge v. Harkey*, 631 S.E.2d 143, 145 (N.C. Ct. App. 2006) ("*[N]o* cause of action may be brought *more than ten years after the defendant's last act* or omission." (emphases added))). A statute of repose simply does not begin to run when a civil suit has accrued or "may be brought."

Later, Respondents collect various state laws, but those quotations only further show that statutes of repose do not begin to run or (as Respondents would have it) "commence" when suit "may be brought." *See* Resp. Br. 19 (quoting Kan. Stat. Ann. § 60-513 ("*[I]n no event* shall an action be commenced more than 10 years *beyond the time of the act* giving rise to the cause of action" (emphases added)); Or. Rev. Stat. § 12.115(1) ("*In no event* shall any action . . . be commenced *more than 10 years from the date of the act* or omission complained of." (emphases added))). The North Carolina statute of repose at issue here is to precisely the same effect. *See* N.C. Gen. Stat § 1—52(16) ("Provided that *no* cause of action shall accrue *more than 10 years from the last act* or omission of the defendant giving rise to the cause of action.") (emphases added)).

In seeking to conflate statutes of limitations and statutes of repose, Respondents mistakenly focus on the accurate point that both of those time limitations impose back-end restrictions on when suit may *not* be

brought. *See* Resp. Br. 18. Here, for example, North Carolina's statute of repose provides that a suit may *not* be brought more than 10 years following the defendant's last action, whereas North Carolina's statute of limitations provides that a suit may *not* be brought more than 3 years following accrual. *See* N.C. Gen. Stat § 1—52(16). But that limited similarity is beside the point, for § 9658 is not concerned with, and in no way modifies, those back-end dates. Instead, the *only* state-law rule affected by § 9658 is the state "commencement date" that defines when a civil suit "may be brought" under state law. And only a statute of limitations can have such a "commencement date," because only a statute of limitations begins to run from when suit "may be brought."

In another attempt to evade the clear import of the statutory definitions, Respondents exhibit a fundamental misunderstanding of the statutory scheme. According to Respondents, Petitioner has made a "mistake" because § 9658 draws no connection between the state-law "commencement date" and the date when a civil action "may be brought." Resp. Br. 19; *see also id.* at 19-20 (arguing that "[t]he phrase 'a civil action . . . may be brought' is from the definition of 'applicable limitations period,' not from the definition of 'commencement date'"). But § 9658 explicitly links the state-law "commencement date" with the date when a suit "may be brought." To repeat: the definition of "commencement date" is "the date specified in a statute of limitations as the beginning of the applicable limitations period." § 9658(b)(3). And the phrase "applicable limitations period" is in turn defined as "the period specified in a statute of limitations during which a civil action . . . may be brought." § 9658(b)(2). Therefore, a "commencement date" is

the "beginning" of the period "during which a civil action . . . may be brought." § 9658(b)(2)-(3). As explained above, that plain statutory meaning applies only to the date when a statute of limitations, not a statute of repose, begins to run. Respondents have failed to apprehend this dispositive point.

Second, Respondents do not come to terms with the fact that the statute affects only a singular "commencement date." As Petitioners have explained, the statute's repeated use of definite articles and singular nouns demonstrates that the Act postpones a single state-law "commencement date." Pet. Br. 24-25. And, when faced with the choice between postponing the running of North Carolina's statute of limitations or its statute of repose, the answer is clear: Congress meant to postpone the "statute of limitations"—that is, the time period that is expressly referenced five separate times in § 9658 and that has a function analogous to the federal discovery rule (which also runs from the date of accrual). Not even Respondents would seriously contend that § 9658 postpones only the running of statutes of repose, while allowing statutes of limitations to run without alteration.

In addressing this independently decisive argument, Respondents concede that § 9658 "preempts only 'one state-law time period,'" but insist that "[t]he dispute here is how to define that time period." Resp. Br. 24. In Respondents' view, "the repose period is plainly *part of* the 'state-law time period' in which claims can be brought under North Carolina law." *Id.* at 24-25 (emphasis added). This view cannot withstand scrutiny. North Carolina law has clearly defined two distinct time periods that frequently—indeed, typically—both begin and end at different

times: first, a statute of limitations that runs for three years from the discovery of injury; and, second, a statute of repose that runs for ten years from the defendant's last act. Pet. App. 10a; *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990). Neither time period is "part of" the other. In fact, the two periods do not even have to overlap. It would be senseless to say, for instance, that a time period spanning from 1990 to 2000 is "part of" a time period from 2010 to 2013. Yet Respondents must say just that.[1]

Third, Respondents' position separately fails because, once a statute of repose has run, there can *never* be a state-law "commencement date" under § 9658. As the statutory text makes clear, § 9658 applies only when there is a state-law "commencement

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[1] While still acknowledging that § 9658 affects only a single time period, Respondents offer (Resp. Br. 25) a glancing "see also" cite to the notion that singular words can sometimes connote plural referents, as when a prohibition on using a single firearm applies to the use of two. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 130 (2012) (discussing 1 U.S.C. § 1 ("[U]nless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things.")). Respondents are right not to advance any argument based on this precept, which has applied only in "rare occasions" where "doing so was 'necessary to carry out the evident intent of the statute.'" *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (citation omitted); *see also id.* at 421 (noting that a statute "uses the word 'element' in the singular, which suggests that Congress intended to describe only one required element"). Here, neither "context" nor Congress's "evident purpose" make it "necessary" to revise § 9658's plain text.

date"—that is, a date when a "civil action . . . may be brought" under state law. § 9658(b)(2). But no such date can possibly exist once the relevant statute of repose has run. And, without a "commencement date" to postpone, § 9658 can have no legal effect.

That situation aptly describes this very case. Respondents allege that they became aware of their purported injury in 2009, whereas Petitioner's last action occurred in 1987. *See* Resp. Br. 13. Based on those allegations, Respondents believe that their claim accrued under North Carolina law in 2009, *see* Plaintiffs' Opp. to MTD, Dkt. 13, at 14 (May 19, 2011) ("Plaintiffs' cause of action did not accrue in this case until . . . 2009."), but that is incorrect. Because the statute of repose ran before accrual could occur, there was *never* a date when, under state law, Respondents' suit could have been "brought." § 9658(b)(2). It follows that there was *never* a "commencement date" capable of being postponed by § 9658. Petitioner featured this independently dispositive argument in its Opening Brief, *see* Pet. Br. 18, 23-24, but Respondents have made no mention of it.

In sum, Respondents' have put forward no coherent reading of § 9658 that would allow its application to statutes of repose.

B. In 1986, Congress Understood The Term "Statute of Limitations" To Exclude Statutes of Repose

When enacting § 9658, Congress did not understand the term "statute of limitations" to encompass statutes of repose. Thus, at a minimum, § 9658 is *best* read not to encompass statutes of repose.

In 1986, when § 9658 was enacted, the law of time bars was experiencing a sea change. States had in-

creasingly revised their statutes of limitations so as to make them run from the date that the plaintiff discovers the fact or source of injury. *See* Pet. Br. 30. In order to recalibrate tort law and continue respecting defendants' interests in finality, many states responded by tempering their discovery rules with "statutes of repose." While that phrase had long been used as an umbrella term encompassing all time limitations, it gradually acquired a narrower meaning, referring to the elimination of a substantive cause of action after a prescribed period of time, regardless of whether a claim has accrued. *See id.* at 30-31; *see also* Resp. Br. 4; Br. of Envtl. Law Professors 5-6 ("Profs. Br."). Thus, the distinctive meaning of the phrase "statute of limitations" had special salience when Congress enacted § 9658.

Many authorities contemporaneous with § 9658—including judicial decisions, legal dictionaries, leading commentaries, and witness testimony during congressional hearings—all used or defined the phrase "statute of limitations" with reference to the date when a plaintiff's cause of action accrues. *See* Pet. Br. 27-34. In addition, Congress's own study group drew a clear terminological distinction between "statutes of limitations" and "statutes of repose." *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, at 241 (Comm. Print 1982). The study group also repeatedly listed the North Carolina statute of limitations at issue in this very case as the applicable "limitations period." *See* Appendix B-9, B-63. Thus, any minimally informed legislator would have understood that the phrase "statute of limitations" did not encompass what we would today call a statute of repose.

Given all this, § 9658 is best read—according to its terms—to apply only to "statutes of limitations," not statutes of repose. Indeed, even Respondents' own *amici* acknowledge the "default presumption that a 'limitations period commences when the plaintiff has a complete and present cause of action,' which is also referred to as the time that the cause of action 'accrues.'" Profs. Br. 8 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005)); *see also* U.S. Br. 19 (same). That "default presumption" dictates that § 9658 is best read as limited to time periods beginning with accrual. In repeatedly using the term of art "statute of limitations," as well as the related term "applicable limitations period," Congress was legislating against a settled background norm that these time periods begin with accrual. *Id.* Therefore, by "default," *Graham Cnty.*, 545 U.S. at 418-19, Congress was *not* referencing time periods beginning at other, more exotic points in time.

In arguing to the contrary, Respondents fail to establish textual ambiguity, much less the superiority of their reading.

Begin with the 1979 edition of *Black's Law Dictionary*, which defined "statute of limitations" with reference to the date when a plaintiff's cause of action has first "accrued." *Black's Law Dictionary* 835 (5th ed. 1979). That definition readily applies to statutes of limitations but excludes statutes of repose, which do not run from accrual. *See* Pet. Br. 21-22. As Respondents observe (Resp. Br. 25), the 1979 edition also noted that statutes of limitations are statutes of repose, but that only shows that the term "statute of repose" was still being used as an umbrella term.

See supra p. 8. The term that Congress actually used in § 9658—"statute of limitations"—was clear. As an aside, Respondents argue that the 1979 edition included a listing for "repose period," Resp. Br. 25-26 (citing *Black's Law Dictionary* 1169 (5th ed. 1979)), but that phrase—which is not even in § 9658—was just another umbrella term.

Respondents' other cited dictionaries (Resp. Br. 26-27) are to much the same effect. With varying degrees of clarity, most of these relatively obscure volumes tend to follow the 1979 edition of *Black's Law Dictionary* by defining "statute of limitations" with reference to the accrual of a claim. For example, one dictionary refers to when plaintiffs "must take judicial action *to enforce rights* or else be thereafter barred from enforcing them." Steven H. Gifis, *Dictionary of Legal Terms* 412 (1983) (emphasis added); *see also* Wesley Gilmer, Jr., *The Law Dictionary* 309 (1986) (noting that a statute of limitations combined with a statute of repose is "sometimes called" a "*hybrid* statute of limitations" (emphasis added)). In any event, there are always errant dictionary definitions, but that is not enough to establish ambiguity. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225-26 (1994).

Respondents next reach for a handful of this Court's decisions, *see* Resp. Br. 27, but here too Respondents come up short. The first case used the term "statute of limitations" to refer to a bifurcated provision allowing for the application of *either* a discovery rule *or* a traditional rule running from the date of injury (when the "violation" is complete). *See Merck & Co.*, 559 U.S. at 638. Another case used the term "statute of limitations" in a sentence referring

to both a statute of limitations and a statute of repose. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976). That statement was ambiguous as to whether the statute of repose was distinct or part of the statute of limitations. Finally, the footnote of one case did clearly use the term "statute of limitations" to refer to a hybrid provision containing both a statute of limitations and a statute of repose. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 n.8 (1991). Yet that isolated case postdated § 9658's enactment and emphasized the differences between the paired rules. For instance, it distinguished the "two periods" and held that only one was substantive and therefore unsusceptible to equitable tolling. *Id.*; *see also* U.S. Br. 21-22.

Respondents also briefly point out that North Carolina's statute of repose is codified in a statutory section whose heading happens to include the word "Limitations." Resp. Br. 18 (citing N.C. Gen. Stat § 1—52(16)). Because the statutory section does not use the legally operative term "statute of limitations," Respondents' argument stumbles out of the gate. In any event, it is black-letter law in North Carolina that the State's statute of limitations is distinct from its statute of repose. *See, e.g.*, Pet. App. 10a. And Respondents have supplied no reason to doubt the binding determination of North Carolina courts on a matter of state law. Thus, the ten-year statute of repose at issue in this case does not establish a "period specified in a statute of limitations." § 9658(a)(1).

In the end, Respondents' effort to establish ambiguity is not just futile but beside the point. Legal terms of art—including mainstays like "jurisdiction" and "standing"—are sometimes misused, including by

this Court. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) ("This Court, no less than other courts, has sometimes been profligate in its use of the term" jurisdiction.); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873, 2014 WL 1168967, at *6 & n.3 (U.S. Mar. 25, 2014) (standing).

Respondents underscore this point by citing decisions that acknowledged the proper meaning of the term "statute of limitations," even as they adopted a different meaning to benefit claimants. *See* Resp. Br. 27; *e.g.*, *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136, 142 (2d Cir. 2013) ("Although statutes of limitations and statutes of repose are distinct in theory . . . ."); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 189 (Fla. Dist. Ct. App. 1991) ("Although we recognize the distinctions in the application of a statute of repose as opposed to a general statute of limitations . . . ."); Resp. Br. 28 (citing search engines). These errant usages cannot dislodge the primary or best reading of a term of art. *See Black's Law Dictionary* 1546 (9th ed. 2009) (distinguishing the terms); John C. P. Goldberg et al., *Tort Law* 412, 419 (2004) (same). This is particularly so because, again, many of Respondents' cases actually recognize the terminological distinction. *E.g.*, Resp. Br. 5 (citing *Harding v. K. C. Wall Products, Inc.*, 150 Kan. 655, 667 (1992)).

In 1986, the overwhelming weight of authority—including its own study group—supplied Congress with ample notice that a "statute of limitations" ran from accrual. For that reason, too, Respondents' reading must fail.

II. FEDERALISM CONCERNS AND RELATED CANONS OF INTERPRETATION PRECLUDE RESPONDENTS' READING

Even if § 9658 were ambiguous, settled principles of statutory construction would preclude its application to statutes of repose.

A. The Presumption Against Preemption And Principles of Federalism Control This Case

Founded on the sovereign dignity of States, the presumption against preemption holds that any ambiguity as to the scope of federal preemption must be resolved against preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Since even the decision below found the scope of § 9658 to be ambiguous, *see* Pet. App. 11a, the presumption against preemption makes this an easy case. Respondents' scant arguments against the presumption are unpersuasive.

To begin with, Respondents posit (Resp. Br. 36) that § 9658 clearly applies to statutes of repose. That unexplained claim is extraordinary. The statute speaks only of a "statute of limitations," and no court, including the decision below, has gone so far as to hold that § 9658 clearly extends to statute of repose. Instead, the decision below and its ilk have *expressly* found the scope of § 9658 to be ambiguous, *see* Pet. App. 11a, and even Respondents have previously endorsed that approach. *E.g.*, BIO 15 ("[T]he Fourth Circuit correctly concluded that the plain meaning of section 9658 can be read to include the statute of repose provision at issue . . . ."). Respondents' discovery of statutory clarity comes late in the day.

Next, Respondents assert—without citation—that the presumption does not apply here because preempting statutes of repose "will allow another

state law (common-law claims) to be given effect." Resp. Br. 36. But if § 9658 were read to affect statutes of repose, the result would be a federal override of fundamental state-law judgments in the domain of tort law—which is precisely what the presumption against preemption counsels against. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Compounding that problem, reading § 9658 to preempt statutes of repose would not "allow" state law to operate as intended, but would instead forcibly *compel* a substantive state-law cause of action, even where state law itself decrees that none should exist.

As their last line of defense, Respondents argue that the presumption does not apply "when Congress enacts a 'comprehensive federal program.'" Resp. Br. 36 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012)). But Respondents rely on case law that explicitly incorporated the presumption against preemption. *See Arizona*, 132 S. Ct. at 2501. In any event, § 9658 does not come close to establishing a "comprehensive" program. Instead, § 9658—which was enacted years after the bulk of CERCLA—makes clear that its preemptive effect is a narrow "[e]xception" to state tort law. § 9658(a)(1). Respondents also purport to find support for their position in a fourteen-year-old court-of-appeals brief filed by the United States—even though that brief did not address the presumption, the scope of § 9658, or whether § 9658 forms part of a "comprehensive federal program." Resp. Br. 37-38 (quoting and block quoting Brief for Intervenor United States, *Freier v. Trico Prods. Corp.*, Nos. 00-7724, 00-7728, 2000 WL 33996142, at *21 (2d Cir. 2000)). The Government's *amicus* brief in this case is a better guide. *See* U.S. Br. 29.

More generally, Respondents' various arguments all fail to appreciate the critical role that the presumption against preemption plays in protecting the "integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Indeed, Respondents' brief is shot through with citations to cases where federal authority was at its zenith, in such areas as foreign affairs, immigration, and field preemption. *See* Resp. Br. 29, 36-37 (citing *Arizona*, 132 S. Ct. 2492 (immigration); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (labor relations); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." (citation omitted)); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (immigration and foreign affairs). Conspicuously absent from Respondents' brief is any serious attention to cases where the federal government intruded on an area of traditional state concern.

Yet this case involves the scope of tort liability, which is *the* paradigmatic area of predominant state authority. *See, e.g.*, *Medtronic*, 518 U.S. at 485. And this Court has consistently recognized that interpretive canons motivated by principles of federalism must trump remedial doctrines, even when the result is to defeat potentially meritorious claims. *See, e.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Indeed, there is no need in this case to *presume* that Congress sought to minimize federal

preemption of state law, since the text and legislative history of § 9658 *demonstrate* that Congress had that goal. *See infra* Part III.

In sum, the presumption against preemption easily resolves this case, Respondents' contrary arguments notwithstanding.

B. Respondents' Position Contravenes The Canon of Constitutional Avoidance

The canon of constitutional avoidance provides an independent reason not to read § 9658 to preempt statutes of repose.

All agree that, under the Constitution, the Federal Government is empowered to displace or negate substantive provisions of state law. For example, Congress may enact legislation that displaces or negates state-law causes of action. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

But the Constitution does *not* give Congress the far greater power to control the content or existence of state law. That is why Congress cannot command States to enact or repeal legislation. *See New York v. United States*, 505 U.S. 144, 161 (1992). Such a power would subvert the basic distinction between federal and state sovereigns by permitting Congress to work its will through state law. The result would be an impermissible blurring of accountability between federal and state lawmakers. *See id.* at 168.

Respondents' reading of § 9658 directly implicates these constitutional concerns. North Carolina's statute of repose is *not* a procedural rule. Rather, statutes of repose like North Carolina's provide for the *substantive* extinguishment of state-law causes of action. *See Bolick v. Am. Barmag Corp.*, 293 S.E.2d

415, 420 (N.C. 1982). When the statute of repose has run, North Carolina's tort causes of action are effectively repealed as to the relevant defendant. This critical point explains why federal preemption of statutes of repose accomplishes much more than mere displacement or negation. If Respondents were correct, then Congress would have assumed the power to *compel* North Carolina to preserve a substantive cause of action as a matter of state law. Put another way, federal law would effectively bar North Carolina from repealing its own cause of action. This Court should construe § 9658 in a way that avoids posing this serious constitutional issue.

Respondents fail to confront the avoidance argument in this case. At the outset, Respondents seek to evade the avoidance canon by alleging forfeiture. Yet Petitioner clearly asserted constitutional doubts in its petition for certiorari, *e.g.*, Cert. Pet. 19-20 (quoting the clear-statement rule of *Gregory*, 501 U.S. at 448, 460), and had no obligation to raise every available argument when defending the judgment of the district court in the court of appeals. In any event, Respondents correctly identify the avoidance canon as an "argument," and arguments are not subject to forfeiture. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (ruling in favor of Petitioner based on an argument that Petitioner "did not raise this point below" and, in fact, had "expressly disavowed"). Confirming as much, Respondents' forfeiture allegation awkwardly rests on a case that rejected an avoidance argument *on the merits* because it would have required an arbitrary carve-out from the statutory language. *See United States v. Apel*, 134 S. Ct. 1144, 1153 (2014).

Respondents next assert that Congress often chooses "to preempt state substantive law," Resp. Br. 38, but those routine cases involve displacement or negation—not efforts to compel the existence of substantive rules of liability, even where the State seeks to eliminate them. *See id.* (collecting cases). A federal law *compelling* the existence of substantive state law would pose special problems. Respondents also cite a Second Circuit decision and, yet again, the U.S. brief in that case. *See id.* at 38-39 (quoting *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002); U.S. *Freier* Br. 25-27). But neither of those sources considered the possibility that § 9658 might preempt statutes of repose. And the Government has now made clear that it *agrees with Petitioner* as to the scope of § 9658. Under that correct interpretation, all agree that § 9658 would not pose constitutional problems. That fact hardly helps Respondents.

Reading § 9658 to preempt statutes of repose would encroach on traditional state prerogatives and raise serious federalism questions. This Court should avoid that result.

III. RESPONDENTS' NEWLY MINTED IMPLIED OBSTACLE ARGUMENT IS MERITLESS

As if to acknowledge that their position has no textual foundation, Respondents ultimately abandon the words of § 9658 in favor of "obstacle" preemption. This newly minted theory is an even more untenable version of the "remedial purpose" argument that the Fourth Circuit erroneously relied on below.

On its face, § 9658 leaves no room for obstacle preemption, since it establishes only a narrow "[e]xception" while providing that "State law [is] gen-

erally applicable." § 9658(a)(1)-(2). *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest . . . ." (internal quotation marks omitted)).

Further, the purpose of § 9658 was not to promote the interests of plaintiffs, but to *balance* the interests of plaintiffs, defendants, and state sovereigns. *See* Pet. Br. 50-51. Due to this approach, plaintiffs who invoke § 9658 must rely on substantive state law, as well as many critically important state procedural rules. For example, § 9658 would have nothing to say about a State that denied plaintiffs their "day in court" by imposing an unreasonably demanding statute of limitations that expired only 24 hours after accrual. Nor would § 9658 stop a state from repealing its substantive tort law as to hazardous-waste actions. In these and myriad other ways, plaintiffs must formulate their claims within the bounds of state law. That pervasive role for state sovereigns is a feature of § 9658, not a bug.

This point is only confirmed by the legislative history on which Respondents rely. The study group report included a host of recommendations pertaining to, among other things, federal administrative remedies, joinder rules, statutes of limitations, and—yes—statutes of repose. *See* Study Group Report 240-51. Choosing from among that wide range of explicitly "procedural and substantive" recommendations, *id.* at 243, Congress singled out the problem caused by certain statutes of limitations. What is more, Congress carefully tailored its intervention in state tort law by rejecting substantive measures in favor of a purely

"[p]rocedural" reform. H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. For the same reason, Congress rejected the study group's proposal to establish a "substantive" federal remedy. *See, e.g.*, 131 Cong. Rec. 35,647 (Dec. 10, 1985) (statement of Rep. Glickman); U.S. Br. 32. Congress's focus on procedural reform explains why it chose *not* to act on the study group's concerns regarding inherently substantive "statutes of repose." To the extent that Respondents disagree with the balance struck by Congress, they should seek relief in the political process—not in court.[2]

Contrary to Respondents' assertion (Resp. Br. 29), § 9658 fully achieves its purpose when read to apply only to statutes of limitations. The basic goal of any statute of limitations is to encourage "prompt" action by plaintiffs. Pet. App. 10a (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) ("[T]he general purpose of statutes of limitations" is "to protect defendants against stale or unduly delayed claims." (internal quotation marks omitted)). Precisely because they run from accrual, statutes of limitations discourage plaintiffs from sitting on their rights and thereby allowing their claims to

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[2] As Respondents' *amici* recount, Congress and the President have already provided special, albeit "limited," relief to certain hazardous waste victims. Br. of Ensminger 19 (discussing the Janey Ensminger Act of 2012, which affords relief to persons exposed to toxic substances at the Camp Lejeune military base). When enacting that deliberately "limited" measure, the political branches chose not to alter § 9658's focus on statutes of limitations and so left statutes of repose intact.

"slumber." *Gabelli*, 133 S. Ct. at 1221 (citation omitted). Inducing claimants to act "at the right time" is a paradigmatically "procedural" objective, *Massaro v. United States*, 538 U.S. 500, 504 (2003), and the discovery rule in § 9658 perfectly fits that goal. According to the study group, many state statutes of limitations held hazardous-waste plaintiffs to a standard of expedition that was unrealistic given "latent injuries." *See* Study Group Report 240-41. In § 9658, Congress legislated a more permissive standard of expedition in hazardous-waste cases: the plaintiff's duty to act expeditiously begins when she learns the cause of her injury.

Respondents also err in contending (Resp. Br. 7, 14, 16) that statutes of limitations and statutes of repose are functionally interchangeable, such that Congress must have viewed them equivalently. Unlike statutes of limitations, statutes of repose do *not* serve the goal of fostering expedition by plaintiffs. Indeed, a statute of repose can entirely run, and thereby extinguish any potential cause of action, before the plaintiff's claim has even accrued. Instead of fostering expedition, statutes of repose (including North Carolina's) promote a distinct value: finality. *See Bolick*, 293 S.E.2d at 420. They guarantee that, after a prescribed period of time, potential defendants are entitled to the security of knowing that they are no longer at risk of being brought to court for events that occurred long ago. That interest in promoting finality is distinct from Congress's objective in § 9658. And statutes of repose pursue that distinct objective through a distinct means: by providing for the elimination of the plaintiff's substantive cause of action. In providing plaintiffs with a procedural standard of expedition in hazardous waste cases,

Congress did not override States' substantive judgments as to the value of repose for defendants.

As a last resort, Respondents fall back to policy arguments and snippets of legislative history. In particular, Respondents argue for "[u]niformity" when it comes to statutes of repose. Resp. Br. 31. And Respondents also emphasize the true (though irrelevant) fact that one legislator, Representative Glickman, "supported a uniform discovery rule." *Id.* at 35 (emphasis omitted). But all agree that § 9658 establishes uniformity as to the commencement dates for (procedural) statutes of limitations. The question presented is whether that federally mandated uniformity also extends to (substantive) statutes of repose. As explained above, Congress answered that question by erring on the side of federalism and allowing fifty flowers to bloom in the area of substantive state tort law.

In § 9658, Congress chose to respect the sovereign authority of States to make choices as to substantive law—including statutes of repose. Respondents' contrary policy preference is legally irrelevant.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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